IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-6714

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent respectfully opposes issuance of a writ of certiorari in the above entitled matter. The questions presented by the Petition have been fully and carefully decided by the Montana Supreme Court in accord with the applicable decisions of this Court. No new, substantial federal questions are raised.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions set forth in the petition, this case also involves the following provisions of the Montana Revised Codes, 1947:

Section 95-2201, R.C.M. 1947:

> "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

Section 95-2502, R.C.M. 1947:

> "Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence."

Section 95-2503, R.C.M. 1947:

> The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports, and any other records, documents, or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the

court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports."

Section 95-2601, R.C.M. 1947:

"Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

Section 95-2602, R.C.M. 1947:

"The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk shall docket the petition upon its receipt and bring the same promptly to the attention of the court."

Section 95-2603, R.C.M. 1947:

"The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition."

Section 95-2604, R.C.M. 1947:

"A motion for such relief may be made at any time after conviction."

Section 95-2608, R.C.M. 1947:

"Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order."

Section 95-2203, R.C.M. 1947:

"No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense."

Section 95-2204, R.C.M. 1947:

"Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court."

Section 95-2501, R.C.M. 1947:

"The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court. This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation."

INTRODUCTORY STATEMENT

The petitioner seeks review of his convictions of deliberate homicide by means of torture and aggravated kidnaping. Petitioner's conviction and death sentence were affirmed by the Montana Supreme Court on November 12, 1976, rehearing denied January 10, 1977. State v. McKenzie, ___ Mont. ___, 557 P.2d 1023 (1976). Petitioner's sentence has been stayed by the district court imposing sentence pending action on the instant petition. A copy of the "Order Staying Execution of Judgment" is set out in Addendum-A.

The crimes of which petitioner was convicted were particularly brutal and vicious. The victim, a young woman, school teacher in rural Montana, was found dead on January 23, 1974, clothed only in a shirt, sweater and bra, having been savagely beaten about the body and head. (Tr. 560-571, 577-579, 1397.) The death blow laid open the right side of her head (Tr. 560-565; 577-579), with death following the blow by minutes (Tr. 564). A rope was around her neck (Tr. 553, 585-586) at the time her body was discovered and the forensic pathologist who autopsied the body testified that the pressure of the rope would have caused death by strangulation if it had not been released; he further testified that the strangling pressure had been released approximately thirty minutes prior to death. (Tr. 585-594, 717-719.) There was evidence that the victim had been raped. Semen was found on her body and in her vagina. (Tr. 601-604, 607-613.) There was a laceration near the vaginal orifice. (Tr. 601, 609-611.)

The evidence connecting the defendant with these crimes has been extensively stated in both the opinion below and the Petition. Respondent adopts the factual statement of the Montana Supreme Court. Although there is some disagreement between the court's factual statement and that of petitioner's, as well as a need to provide some additional facts, the

areas of disagreement and the additional facts are directly responsive to specific arguments of the petitioner and are therefore referred to in respondent's argument, infra.

Respondent does not dispute the petitioner's citation of the case below or his jurisdictional allegation.

ARGUMENT

I. The Imposition Of The Death Penalty Meets The Constitutional Standards Announced In Gregg v. Georgia, 428 U.S. 153 (1976), And Its Companion Cases.

Petitioner was found guilty of deliberate homicide and aggravated kidnaping. In connection with its guilty verdicts, the jury entered separate findings that the homicide was committed by means of torture and the victim died as the result of the kidnaping. The judge who imposed sentence stated that the crimes were of equal gravity and seriousness ("Findings, Conclusion, Sentence and Order", Ct. File Item 169, page 7), and imposed the sentence of death on account of both crimes (Ibid).

The petitioner attacks the imposition of the death penalty on four grounds, all but one of which are directed to Montana's death penalty statutes generally rather than the particular facts of the petitioner's case. The Montana Supreme Court gave careful and lengthy consideration to the petitioner's arguments, specifically applying the principles and standards of the 1976 death penalty cases of Gregg v. Georgia, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. ____, 49 L.Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed. 2d 944 (1976); and Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); it upheld the constitutionality of the death penalty. State v. McKenzie, supra, 555 P.2d at 1034. The opinion of the court and a concurring opinion of Justice Haswell answer the petitioner's present contentions. Respondent has therefore limited its argument to supplementing the reasoning of the court below and meeting the specific allegations of the petition.

Furman v. Georgia, 408 U.S. 238 (1972) condemned state death penalty statutes existing in 1972 on the finding that the imposition of the death penalty was left to the uncontrolled discretion of judges and juries, with the result that it was being arbitrarily and discriminatorily applied.[1] Thereafter, Montana was one of many states enacting new death penalty statutes in an attempt to meet and overcome the constitutional infirmity found by Furman. Montana's death penalty statutes were enacted in 1973 as a part of its comprehensive new criminal code. State v. McKenzie, supra, 557 P.2d at 1029.

At the time petitioner was sentenced to death, the applicible sentencing provisions for deliberate homicide were Section 94-5-102, 1947 Revised Codes of Montana, and Section 94-5-105, 1947 Revised Codes of Montana. Section 94-5-102 provided in relevant part:[2]

> "94-5-102. Deliberate homicide.
> * * *
> (2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years."

Section 94-5-105 provided in relevant part:[3]

> "94-5-105. Sentence of death for deliberate homicide. (1) When defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
> (b) The defendant was previously convicted of another deliberate homicide; or
> (c) The deliberate homicide was committed by means of torture; or
> (d) The deliberate homicide was committed by a person lying in wait or ambush; or
> (e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."

1/ See separate, concurring opinions of Justices Douglas, Brennan, Stewart and White.

2/ Section 94-5-102 remains in effect, unamended to the present date.

3/ Section 94-5-105 was amended subsequent to petitioner's trial by Montana Session Laws of 1974, Section 1, Chapter 262, which added a subsection (2) providing a mandatory death

The applicable sentencing provisions for aggravated kidnaping were Section 94-5-303, 1947 Revised Codes of Montana, and Section 94-5-304, 1947 Revised Codes of Montana. Section 94-5-303 provided in relevant part: [4]

> "94-5-303. Aggravated kidnaping.
> * * *
> (2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years."

Section 94-5-304 provided in relevant part: [5]

> "94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances."

In Gregg v. Georgia, supra, this court held that carefully drafted death penalty statutes which particularize and restrict sentencing discretion in death penalty cases are not unconstitutional, but the petitioner contends, as did the petitioner in Gregg, [6] that post-Furman Montana death penalty statutes have made only cosmetic changes and continue to permit the arbitrary and capricious application of the death penalty which was condemned by Furman. Careful analysis of the Montana statutes refutes these contentions.

The decisions in Gregg and its companion cases do not mandate any particular death penalty statute. The Georgia, Florida and Texas statutes upheld in Gregg, Proffitt, and Jurek differ in important respects. The Florida statute delegated the sentencing decision to the trial judge while the Texas and Georgia statutes delegated the decision to the jury. The Texas statute differed from the Georgia and Florida ones in providing for consideration of statutory aggravating circumstances at the guilt determining stage of trial rather than the sentencing stage. All three statutes differed as to the enumerated aggravating and mitigating circumstances, although there was overlap. What the statutes all shared in common were: Their restriction of the imposition of the death penalty to a few, limited classifications of aggravated homicide; their requirement that specified mitigating circumstances relating to the individual defendant and crime be considered in determining whether to impose the death penalty; and their provision for prompt judicial review of the sentencing decision. The Montana death penalty statutes share those same features.

The separate finding of one of the aggravating circumstances enumerated in Section 94-5-105, 1947 Revised Codes of Montana, or Section 94-5-304, 1947 Revised Codes of Montana, was a prerequisite to consideration of the death penalty in the petitioner's case. The aggravating curcumstances enumerated by those sections are even more limited than the eight circumstances reviewed in Proffitt and the ten circumstances

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sentence, without consideration of mitigating circumstances, for defendants convicted of deliberate homicide in which the victim was a peace officer killed while performing his duty. Newspaper reports available to respondent indicate that this court in Roberts v. Louisiana, decided June 6, 1977, held unconstitutional a Louisiana mandatory death sentence for persons convicted of killing police officers, raising serious questions of constitutionality of the 1974 amendment to Section 94-5-105. This amendment, however, is not at issue in the present case.

4/ Section 94-5-303 remains in effect, unamended to the present date.

5/ Subsequent to petitioner's trial the Montana legislature amended Section 94-5-304 to delete the words "unless there are mitigated circumstances". Montana Sessions Laws of 1974, Chapter 125, Section 1. See note 2, supra.

6/ "The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by Furman continue to exist in Georgia - both in traditional practices that still remain and in the new sentencing procedures adopted in response to Furman." Gregg v. Georgia, supra, 428 U.S. at ___, 49 L.Ed. 2d at 889.

reviewed in Gregg.[7] In both Gregg and Proffitt, the respective petitioners contended that the enumerated circumstances were so vague and broad that the death sentence could be imposed for virtually any first degree murder conviction. Like the statutory scheme in Proffitt, aggravating circumstances under the Montana statutes are considered by the jury at the guilt determining stage of trial.

Much of the petitioner's argument attacking the Montana death penalty statutes is directed to the "mitigating circumstances" feature of the statutes. He argues specifically that the Montana statutes give the judge who imposes sentence broad and unguided discretion, asserting in his Petition at page 25-26 that "neither the aggravating or mitigating factors (taken into consideration by the judge when imposing sentence) have any statutory basis." Such is not the case! The petitioner's argument is based on an incomplete understanding of Montana sentencing requirements. The concurring opinion of Justice Haswell in the opinion below, points out that the death penalty statutes, and in particular the provisions requiring consideration of mitigating circumstances, must be read in conjunction with Montana sentencing statutes of general applicability:

7/ The aggravating circumstances specified by the Montana statutes are similar to the circumstances enumerated in the Florida statute considered in Proffitt, 428 U.S. at ___, 49 L.Ed. 2d at 921 (footnote 6), and the Georgia statute considered in Gregg, 428 U.S. ___, 49 L.Ed 2d at 870 (footnote 9). Subsection (c) of Section 94-5-105, covering homicide committed by means of torture is similar to subsection (h) of the Florida statute which provides, "(h) the capitol felony was especially heinous, atrocious or cruel", and subsection (b)(7) of the Georgia statute, which provides, "(7) the offense of murder, rape, armed robbery or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The jury was instructed at petitioner's trial that torture meant that the petitioner purposely and knowingly inflicted cruel suffering on the victim for the purpose of extorting something from her, persuading her against her will or satisfying some untoward propensity of the petitioner. (Prelim. Instr. 29-II and Add. Instr. 34, Ct. File Item 154.) The aggravating circumstance for kidnaping, the death of the victim, corresponds to the felony-murder circumstance of subsection (d) of the Florida statute and subsection (b)(2) of the Georgia statute.

> * *** Defendant urges that the "unless" (there are mitigating circumstances) clause may purport to circumscribe the sentencing judge's authority, but that there are no guiding standards nor sources of information provided for. This argument ignores the second statutory provision relevant here, that is, the presentence investigation and report provisions. Section 95-2203, R.C.M. 1947, requires a written presentence investigation report to be delivered to and considered by the sentencing court in felony cases. Section 95-2204, R.C.M. 1947, provides the report shall contain information respecting 'the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; * * * and the harm to the victim, his immediate family, and the community'. The report provides the sentencing authority with whatever curcumstances may exist in mitigation of the defendant's conduct.
>
> Reading the two provisions together, the sentencing court is required to consider mitigating circumstances, and is required to consider the presentence investigation report which must contain any matters relevant to mitigation. In addition, all sentencing courts are directed by section 95-2201, R.C.M. 1947, to perform their sentencing functions 'to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities'. This mandates the imposition of sentences which are not disproportionate to the severity of the crime. Finally, the defendant is authorized to seek a hearing to present to the court his testimony and evidence in mitigation of punishment." 557 P.2d at 1046.

At his sentencing hearing, the petitioner was afforded an unrestricted opportunity to present evidence rebutting any matter in his pre-sentence report, a copy of which he was furnished, and any new matter which concerned mitigation. Petitioner declined the opportunity (Tr. 2611-2612), relying instead on a "Petition and Motion in Mitigation", a copy of which is set forth as Addendum-B, and the district court specifically found that there were no mitigating circumstances and set forth the specific reasons for imposing the death penalty. ("Findings, Conclusions, Sentence and Order". Ct. File Item 169; Tr. 2613-2617.)

Section 95-2502, 1947 Revised Codes of Montana, provides for prompt judicial review of sentencing to all criminal defendants sentenced to imprisonment of one or more years. Montana Supreme Court held the provision applicable to defendants sentenced to death. State v. McKenzie, 557 P.2d at 1032. Review is by a sentencing review division of three district court judges appointed by the Chief Justice of the Montana Supreme Court pursuant to Section 95-2501, 1947 Revised Codes of Montana. Both the appellant and his counsel may appear at the review proceeding and provision is made for the production of presentence reports, and other records which are relevant to the review. Section 95-2503, 1947 Revised Codes of Montana. The sentencing review division is empowered to decrease any penalty and impose in its stead any other sentence which could have been imposed, Section 95-2503, 1947 Revised Codes of Montana, thus giving it the power to reduce a death sentence to a sentence of imprisonment if it finds mitigating curcumstances. The petitioner's claim that imposition of the death penalty violated his constitutional rights also gave him another manner of appeal, by petition pursuant to Section 95-2601, 1947 Revised Codes of Montana:

> "95-2601. Petition in the trial court. Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

A further appeal to the Montana Supreme Court from a denial of a petition is provided by Section 95-2608, 1947 Revised Codes of Montana. Finally, the Montana Supreme Court in its opinion below recognized the constitutional issues

raised by each death sentence and has declared its jurisdiction and intention to review all death sentences, giving specific consideration to the appellate review factors outlined in Gregg at 428 U.S. at ___, 49 L.Ed 2d at 892-893. In the opinion below the Montana Supreme Court said:

> "* * * this court looks at the total record during its review to determine whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and, whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We affirm * * *." 557 P.2d at 1034.

In summary the Montana death penalty statutes are carefully drafted to ensure that sentencing is imposed on the basis of articulated, statutory standards relating to the circumstances of the crime and defendant. Appellate review insures statewide uniformity, consistency and fairness in imposing the death penalty.

Petitioner's argument that the decision of whether he should live or die must rest with a jury rather than a judge was rejected by this court in Profitt, where it was pointed out that judicial sentencing is not only permitted but should lead to greater consistency in imposing the death penalty. 428 U.S. at ___, 49 L.Ed. 2d at 923, (plurality opinion).

Finally, petitioner's assertion that his sentence was based upon two erroneous "factual predicates" is itself erroneous. His argument asserts that the trial judge was mistaken when he stated in his sentencing order that:

> "The evidence in this, as found by the jury, discloses a brutal, consciousless, torture, rape, and deliberate killing of a human being." ("Findings, Conclusion, and Order", Ct. File Item 169, page 7.)

Petitioner objects to the use of the word "rape". While petitioner was not convicted of the separate crime of rape, since the jury was specifically instructed not to consider

any further counts of the Information if it found petitioner guilty of deliberate homicide and aggravated kidnaping (Tr. 2592, 2595-2596), his objection overlooks both the evidence at trial and the nature of the charges of which he was convicted.

Petitioner was tried on a seven count Amended Information (Ct. File Item 74), a copy of which is set forth in Addendum-C. Count five charged petitioner with rape. All seven counts related to a single, continuous series of events involving the abduction and murder of Lana Harding. Petitioner was convicted on count two, which charged him with purposefully and knowingly causing the death of Lana Hardy while engaged in the commission or attempt to commit the crime of "sexual intercourse without consent" or "aggravated assault" and causing the death by means of torture.[8/] He was additionally convicted on count three, which charged him with the aggravated kidnaping of Lana Harding for the purpose of committing the crime of "sexual intercourse without consent" or the crime of "aggravated assault". The jury was instructed that as a prerequisite to finding petitioner guilty of the deliberate homicide charge in count two and the aggravated kidnaping charge of count three, they were required to find that petitioner committed those acts while committing or attempting to commit either the crime of "sexual intercourse without consent" or "aggravated assault". (Prem. Instr. 25 and 29-I; Add. Instr. 33 and 35. Ct. File Item 154.) The element of "torture" of the deliberate homicide required a finding that the petitioner inflicted cruel suffering upon th victim for the purpose of extorting something from the victim, pursuading the victim against her will, or satisfying some untoward propensity of the petitioner.

8/ The charge that petitioner committed the murder by "lying in wait or ambush" was withdrawn from the jury's consideration. (Tr. 2582.)

(Prelim. Instr. 29-II and Add. Instr. 34, Ct. File Item 154.) Thus, inherent in the guilty verdict was a finding that petitioner kidnaped and murdered the victim while committing or attempting to commit rape or aggravated assault, and a review of the evidence at trial demonstrates the impossibility of separating the rape element from the assault element. The victim was found not only beaten to death but was found only partially clothed, with semen on her body and in her vagina, and with a laceration adjacent to the vaginal orifice, (Tr. 601-604, 607-613.) Evidence was introduced at trial that petitioner had, a few days prior to the murder, purchased a new (used) truck and on the day prior to the discovery of the victim's body petitioner told a fellow worker that he broke in every new vehicle by having sexual intercourse in it. (Tr. 2085, 1752-1753.) A few days prior, the petitioner had stated that he had intercourse with country school teachers because they were naive and easy to get and he could "teach them". (Tr. 2054-2056.) Furthermore, the evidence of sexual attack was properly considered as a separate matter when sentencing petitioner. The evidence was related and helpful to determining the sentence, see Williams v. New York, 337 U.S. 241 (1949); and reliable, Gardner v. Florida, ___ U.S. ___, 245 U.S.L.W. 4275 (decided March 22, 1977).

Petitioner's second assertion of an erroneous factual predicate concerns a statement by the trial court that petitioner would be eligible for parole in twelve and one half years if a sentence of one hundred (100) years imprisonment were imposed. The trial court's statement was a correct statement of the law at that time. Section 95-3214, 1947 Revised Codes of Montana, provided: [9/]

9/ The reference in Section 95-3214 to Section 80-740 was changed to Section 80-1905 by amendment enacted March 11, 1974, Montana Session Laws of 1974, Chapter 120, Section 86.

> "95-3214. Parole authority and procedure. The board shall release on parole any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided,
>
> 1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half (12 1/2) years; " (Emphasis supplied.)

Thus, the trial court's statement was correct, and even if incorrect, the petitioner had ample opportunity to bring the alleged error to the court's attention, to the attention of the sentencing review division of the Montana Supreme Court, and finally to the Montana Supreme Court. If the statement was erroneous and the death sentence based on such statement, the sentence could have been corrected, and the fact petitioner's sentence was not changed indicates that the statement was either correct, or not the basis of the imposition of sentence. In any event, the statement was extraneous for sentencing purposes. The proper inquiry upon sentencing was whether there existed any mitigating circumstances and it is difficult to conceive how any error of a few years in parole eligibility establishes a mitigating circumstance. The trial court expressly found that there were "no mitigating circumstances". (Findings, Conclusions, Sentence and Order, page 7, Ct. File Item 169.)

II. The Trial Court's Instruction Concerning Burden Of Proof On Defense Of Mental Defect Excluding Responsibility Did Not Shift Burden Of Proof To Petitioner To Disprove One Of The Elements Of The Offenses Charged. The Instruction Did Not Violate The Constitutional Requirement That The State Prove Every Element Of A Crime Beyond A Reasonable Doubt.

The petitioner in his second assignment of error, asserts that the trial court's instruction given as Added Instruction 53, Ct. File Item 154, placed the burden of proof upon petitioner to prove that he did not have the requisite mental state which was an element of the crimes charged. He then argues that this shift in burden of proof violates the requirement that the prosecution prove every element of the crime charged beyond a reasonable doubt, citing In re Winship, 397 U.S. 358 (1970) and Mulhney v. Wilbur, 421 U.S. 684 (1975). Petitioner's construction and characterization of Added Instruction 53 misstates the content and effect of the instruction. A copy of the Instruction in question is set forth in full in Addendum-D. Except for the very last sentence of the four page instruction, the instruction deals exclusively with the traditional insanity defense.

Section 95-501, 1947 Revised Codes of Montana, comprehends what is commonly referred to as the insanity defense, providing:

> "95-501: Mental disease or defect excluding responsibility.
> (a) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
> (b) As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by criminal or otherwise antisocial conduct."

The burden of proof of proving a defense based on mental disease or defect is upon the defendant to establish by preponderance of the evidence. Section 95-503, 1947 Revised Codes of Montana. Added Instruction 53 explains the insanity

defense in terms understandable to a jury and carefully cautions, both at the beginning and end of the instruction, that such defense was to be considered only if the jury first concluded beyond a reasonable doubt that the petitioner committed the acts charged. The first two paragraphs of the instruction provide:

I.

> "The defendant has served notice on the court that he suffers from a mental disease or defect which excludes his responsibility for the acts charged against him by the State of Montana and that he intended to introduce evidence in support of his defense.
>
> By this notice and defense the defendant does not admit that he committed the acts charged against him, but in effect says if you find beyond a reasonable doubt that I did do said acts or any of them, that because of a disease or defect of mind from which I suffered I was unable at the time to appreciate that said acts were criminal, or in the alternative, if I did appreciate the criminality of the acts I was unable because of said mental disease or defects to avoid the commission of said acts."

The last paragraph repeats the warning that defendant's crimes must be established beyond a reasonable doubt before a defense based on mental disease or defect can be considered:

> "Since the defendant, by interposing of the defense of disease or defect of the mind which excludes responsibility for conduct, does not admit any of the acts charged against him, and since the defense goes only to the mental responsibility and control of the defendant, you should first determine from the evidence in the case beyond a reasonable doubt whether the defendant did do the acts charged against him in the information. * * *"

In his Petition, the petitioner quotes and characterizes Section 53 as follows, at page 50:

> "If the jury found beyond a reasonable doubt 'that the defendant did do the act or any of the acts charged against him', without regard to what his mental state was:
>
> 'You are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.'

The above text in petitioner's brief is a misrepresentation of the jury instruction. Nowhere in the instruction is the jury charged to consider whether the defendant did the acts charged "without regard to what his mental state was". In each instance the jury was charged that they must find the petitioner guilty of the acts charged beyond a reasonable doubt and were separately charged that an element of the acts charged was the mental state of "purposely and knowingly", which they were required to find beyond a reasonable doubt in order to convict (Prelim. Instr. 7, Ct. File Item 154). Petitioner begins the foregoing quotation in a middle of sentence, with good reason, because the full text of that sentence does not support his characterization. The entire sentence reads:

> "Therefore, if you find beyond a reasonable doubt that defendant did do the act or any of the acts charged against him, you are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law."

The second paragraph of petitioner's quotation is correctly stated.

The only mention in the instruction of petitioner's mental state is at the very end of the instruction where the court permits the jury, once it has already found beyond a reasonable doubt that the petitioner committed the acts charged, to consider whether on account of mental disease or defect he was precluded from having the requisite mental state:

> "* * * If you find beyond a reasonable doubt the defendant did do said acts or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your mind as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed."

The instruction does not place the burden of disproving the mental element of the offenses of deliberate homicide and aggravated kidnaping upon petitioner but merely permits

the jury, once they had found beyond a reasonable doubt that petitioner committed homicide and kidnaping "purposely and knowingly" to then consider whether the petitioner was so afflicted with a mental disease or defect as to preclude the existence of a mental state which the jury would otherwise infer from the facts and circumstances of the crime. Consideration of mental defect or disease for such purpose is sometimes referred to as the defense of "diminished responsibility", a term which does not accurately characterize the nature of the defense, which is the proof of mental disease, defect, or derangement, short of insanity, to show lack of deliberation or premeditation. State v. Padilla, 66 N.M. 289, 347 P.2d 312, 314 (1959); and State v. Anderson, 515 S.W. 2d 534, 540 (Mo., 1974); Comment Note. - Mental or Emotional Condition as Diminishing Responsibility For Crime, 22 A.L.R. 3d 1228. The defense in Montana is provided by statute, Section 95-502, 1947 Revised Codes of Montana, which provides:

> "95-503. Mental disease or defect admissable when relevant to element of the offense. Evidence that the defendant suffered from mental disease or defect is admissable whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

The defense is analagous to that of insanity, State v. Holden, 85 N.M. 397, 512 P.2d 970, 972, cert. den. 85 N.M. 380, 512 P.2d 953 (N.M. Court of Appeals 1973); in that both defenses concern mental disease or defect which make the normal assumptions and inferences concerning human conduct, free will, and moral responsibility, inapplicable.

The case of Leland v. Oregon, 343 U.S. 790 (1952), which upheld the constitutionality of an Oregon statute placing the burden on a defendant to prove an insanity defense beyond a reasonable doubt, is equally applicable

to a defense of mental disease or defect excluding defendant's capacity to have a particular mental state of mind. Both defenses request the fact finder to abrogate the usual rules and assumptions concerning human conduct; both rely principally on testimony of psychiatrists, psychologists and related specialists. Many courts have pointed out the conflict in and unreliability of such expert testimony. See e.g. Greenwood v. United States, 350 U.S. 366, 375 (1956); Sauer v. United States, 241 F.2d 640, 667 (19th Cir. 1957); Commonwealth v. Carroll, 194 A. 2d 911 (Pa. 1963); Commonwealth v. Smith, 258 N.E. 2d 13, 20 (Mass. 1970) and see generally, Hall, Psychiatry And Criminal Responsibility, supra, and Hardisty, Mental Illness: A Legal Fiction, 48 Wash. L.R. 735 (1973). "The only thing which can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment ***." Greenwood v. United States, supra, 350 U.S. at 375. Placing the burden of persuasion on defendant as to prove mental defect or disease does not offend "some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 523 (1958)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105). The assumption that the actions of defendants charged with crime are the product of free will and conscious choice is fundamental to the American system of criminal justice. See Davis v. United States, 160 U.S. 469, 486 (1895); Morissette v. United States, 342 U.S. 246, 250 (1952); and see also Hall, Psychiatry And Criminal Responsibility, 65 Yale L.J. 761 (1956). "Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible." Sauer v. United States, supra, 241 F. 2d at 648. These assumptions give

rise to many inferences and presumptions regarding human conduct which are employed in criminal cases, including the inference of mental state from outward manifestations, see American Communications Association v. Douds, 339 U.S. 382, 411 (1950); the inference of criminal intent from acts of a defendant, Kawakita v. United States, 343 U.S. 717, 742 (1952) and see Cox v. Louisiana, 379 U.S. 559, 567 (1965); and a presumption that a person intends the natural consequences of his acts, Cramer v. United States, 325 U.S. 1, 31 (1945) and Agnew v. United States, 165 U. S. 36, 50 (1895). Petitioner would turn the criminal law on its head and require the state to prove beyond a reasonable doubt that the normal assumptions and inferences concerning human conduct apply to each defendant and that each defendant does not suffer from any mental defect or disease precluding the application of such inferences and assumptions. Thus, petitioner takes exception to the inference that purposeful and knowing action in a homicide case can be inferred in circumstances showing that the victim was subjected to strangulation so severe that had it not been released it would have caused her death some thirty minutes prior to actual death; that she was savagely beaten to death, the death blow laying open the entire side of her head and exposing brain tissue; and that she was found unclothed in circumstances evidencing a sexual attack. Petitioner argues, page 46 of the Petition, "during its case-in-chief, the State made no effort to prove the petitioner had committed a homicide or kidnaping 'knowingly or 'purposely'." His statement is incredible; the inference that the murder in such circumstances was done purposely and knowingly is not merely reasonable, it is overwhelming, but petitioner denies these inferences and proposes that this court should require the state to prove beyond a reasonable doubt that he had the mental capability of doing such an act purposely and knowingly. It is thus

apparent that petitioner's basic quarrel is with the fundamental premise of criminal law that men are morally accountable and responsible.

In the present case, the instructions of the trial court did not shift the burden of proof to petitioner on the mental element of the crimes charged, but merely permitted the State to prove the mental element beyond a reasonable doubt utilizing the normal inferences concerning human conduct without requiring it to prove beyond a reasonable doubt that such normal inferences and assumptions apply to the particular defendant. This case differs significantly from Mullaney v. Wilbur, supra, a case in which the prosecution was not required to establish the mental element of the offense beyond a reasonable doubt even under applicable assumptions and inferences of the criminal law.

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution do not require either the States or the United States to permit criminal defendants to assert and prove a defense based on lack of mental capacity to have the requisite mental element of the crime charged. See Fisher v. United States, 328 U.S. 463 (1946). Many States, such as Montana, permit the defense, but many States do not. The cases are annotated in Comment Note. - Mental or Emotional Condition as Diminishing Responsibility for Crime, 22 A.L.R. 3d 1228. There being no constitutional requirement that the defendant be permitted to raise the question of mental defect or disease excluding mental condition, it follows that the State cannot be required to prove lack of mental disease or defect beyond a reasonable doubt.

III. Requiring Petitioner To Establish A Defense Of Lack Of Criminal Responsibility On Account Of Mental Disease Or Defect By A Preponderance Of The Evidence Does Not Violate The Petitioner's Right To Due Process Of Law.

The petitioner's third assertion of error, that he bore the burden of establishing lack of criminal responsibility on account of mental disease or defect was rejected in Leland v. Oregon, 343 U.S. 790 (1952), which upheld the constitutionality of an Oregon statute requiring defendant to establish any defense of insanity beyond a reasonable doubt.

IV. Petitioner's Argument That A Tentative Plea Bargain Agreement Should Be Enforceable Even Though Defendant Has Not Entered A Guilty Plea Is "Novel" But Does Not Raise A Constitutional Question.

In Santebello v. New York, 404 U.S. 267 (1971), this Court held that when a defendant enters a plea of guilty in exhange for an agreement by the prosecutor to make no recommendation concerning sentence, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. Based on Santabello the petitioner argues that it was error for the trial court not to enforce a tentative plea agreement reached between the prosecutor and defense counsel. Petitioner cites no case enforcing a plea agreement prior to actual entry of a guilty plea.

The reasons for enforcing a plea bargain agreement in cases where a defendant has pleaded guilty in reliance upon promises of the prosecutor are evident. The defendant, by his guilty plea, gives up substantial basic constitutional rights, including the right to trial by jury; the right to be confronted by witnesses; and the right against self-incrimination. In the present case the petitioner did not give up substantial rights. At most he disclosed vague matters of trial strategy employed by defense counsel in general. Further, the disclosures were not requested by the prosecution and were apparently made by defense counsel in an attempt to clinch the tentative agreement.

Petitioner's version of the plea bargaining powers is set forth in his attorney's affidavit dated December 30, 1974 (Ct. File Item 99), a copy of which is set forth as Addendum-E. Several noteworthy matters appear in the affidavit. First, the information which was allegedly disclosed by defense counsel is set forth in the most general and self-serving terms:

> "Subsequent to this meeting with the court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influence of public opinion by the Sheriff of Pondera County, (sic) your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreements heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury and where certain assumptions being made by the Sheriff and Prosecution were fallacious. * * *" (Page 4.) (Emphasis Supplied)

Nowhere does petitioner explain how such disclosure, whatever it was, interfered with his defense or gave the prosecution an unfair advantage. He did not waive any right to object to admission of evidence based on ineptitude in the investigation, and how the prosecutor could have avoided such objections if raised is a matter of speculation. In footnote 13 to his Petition, the petitioner asserts that difficulty in establishing the chain of evidence was one of the primary weaknesses of the State's case, pointed out to the prosecutor, but where this fact appears in the record, and the exact nature of such disclosure, is not revealed and remains an enigma to respondent. Second, the affidavit shows that plea bargaining was initiated by defense counsel and reluctantly approached by the prosecutor. Defense counsel broached the subject to the prosecutor on December 9, 1974, almost a year after petitioner's arrest and a few weeks prior to trial. He subsequently renewed the subject but the prosecutor "left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor * * *." (Affidavit, Page 1.) Meaningful negotiations did not begin until December 20, 1974 and defense counsel expresses his continuous awareness of the prosecutor's fears of public reaction to any plea bargain,

a concern that defense counsel concedes continued to the date he made his purported defense strategy disclosures. The disclosures were admittedly made in an effort to calm possible public reaction. Nowhere does it appear that the prosecutor requested the information disclosed. Finally, the affidavit contains conclusory statements of defense counsel's "understanding" that a "final and complete bargain" had been struck on December 23, 1974 (page 4) but no evidence is offered to show that the prosecutor committed himself to any agreement. The evidence upon which the petitioner requests this Court to review and enforce the purported plea agreement shows no more than defense counsel's voluntary disclosure of vague information concerning trial strategy in an effort to "nail down" a favorable plea arrangement for his client.

V. Probable Cause Did Exist To Search Petitioner's Residence And Truck, The Search Warrant Did Not Authorize A General Search, And The "Plain View" Doctrine Authorized The Seizure Of Evidence Not Described In The Search Warrant.

As a fifth issue, petitioner argues that the introduction at trial, of evidence seized from his residence and his truck, pursuant to a search warrant, violated his rights under the Fourth Amendment to the Constitution of the United States. His argument is specifically twofold: (1) that nothing was presented to the issuing magistrate to furnish probable cause to search petitioner's residence or truck; and (2) that certain items seized in the search were not particularly described in the search warrant, and therefore should have been suppressed upon his motion.

The sequence of events leading to the issuance of the search warrant in question, as stated by petitioner, are substantially correct. However, petitioner has merely highlighted parts of the affidavit requesting the warrant. Respondent respectfully submits that a better understanding of the facts pertinent to this issue are more readily understandable from the affidavit and the search warrant themselves.

In addressing petitioner's initial argument, the court should keep in mind its well established principles concerning probable cause, search warrants, and the proper scope of review to be exercised by appellate courts. As stated in Spinelli v. United States, 393 U.S. 410, 419, 21 L.Ed 2d 637, 89 S.Ct. 584 (1969):

> "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity, is the standard of probable cause, that the affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, and that their determination of probable cause should be paid great deference by reviewing courts." (Emphasis supplied.)

Furthermore, the court stated in Aguilar v. Texas, 378 U.S. 108, 12 L.Ed 2d 723, 84 S.Ct 1509 (1964), and again in U.S. v. Ventresca, 380 U.S. 102, 105, 13 L.Ed 2d 684, 85 S.Ct. 741 (1965):

> "An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers ... who may happen to make arrests."
>
> "In Jones v. U.S. (citation omitted) this court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall."

Keeping these principles in mind, it is apparent that the issuing magistrate did indeed use common sense in directing a search to be made of petitioner's residence and truck.

First of all, a common-sense reading of the affidavit certainly presents the probability of criminal activity. Lana Harding, a conscientious school teacher, was not present at her school class on January 22, 1974 and she lived next door to the classroom in a teacherage. There was evidence of a scuffling inside the teacherage, evidence of an object being dragged from the teacherage outside, one tennis shoe with the bow tied was found outside the teacherage, and blood stains, along with a woman's watch, were found near the teacherage.

Secondly, the petitioner was connected to the scene of the alleged crime. Petitioner's black Dodge pickup, which was newly acquired from a resident of the area, and which was familiar to residents of the area, was stalled within one hundred feet of the teacherage on the night of January 21, 1974. Petitioner sought the help of Don Pearson, who resides next to the teacherage, in starting petitioner's pickup, approximately between 8 p.m. and 8:30 p.m. At this time, petitioner appeared nervous, excited and out of

breath. Furthermore, the woman's watch and the blood stains were found in the area where petitioner's truck was stalled.

It appears petitioner is indeed placing restrictions upon the issuing magistrate's common sense by insisting that no probable cause existed to search petitioner's residence or truck. The truck was concretely connected with the scene of the crime and petitioner. Don Pearson helped petitioner start his truck, which was stalled within one hundred feet of the teacherage in the vicinity where the blood stains and the woman's watch were subsequently found. A careful reading of the petitioner's argument reveals that his main objection is to the introduction of a pair of Red Wing boots and a plaid jacket found at petitioner's residence, and an argument aimed at the search of the truck is not wholeheartedly made by petitioner.

As for the search of petitioner's house, the affidavit requested a search warrant to obtain any evidence leading to the disappearnce of Lana Harding, including certain articles of clothing worn by petitioner on the night of January 21, 1974. Again, a common-sense conclusion would be that which was made by the magistrate, namely that petitioner's clothing could be located at his residence. Of course, one can dream up a number of possibilities other than this, but the logical conclusion is that arrived at by the issuing magistrate. Respondent respectfully suggests the court keep in mind its policy statements found in United States v. Ventresca, supra, 108-109:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." * * * (Emphasis supplied).

> "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Petitioner begins the second phase of his search and seizure argument by attacking the validity of the search warrant on its face, alleging that it is a general warrant. Such is not the case. We agree that searches under indiscriminate and general authority are prohibited, and that warrants are therefore required to particularly describe the places to be searched and the persons or things to be seized. Warden v. Hayden, 387 U.S. 294, 18 L.Ed 2d 782, 87 S.Ct. 1642 (1967). The warrant in question specifically described the petitioner's residence and truck as the places to be searched. Furthermore, the warrant specifically described certain articles of clothing to be seized.

The legality of the warrant on its face was not destroyed by the use of the phrase "and any other contraband articles", as contended by petitioner. This warrant did not authorize an exploratory search. The true test of the warrant on its face is whether the place to be searched and the items to be seized were as precisely identified in the warrant as the nature of the activity permitted. James v. United States, 416 F.2d 467 (5th Circuit, 1969), cert. den. 397 U.S. 907 (1970) Furthermore, the James case stated that when an exact description of instrumentalities is made virtually impossible by the circumstances, the generic class of the items to be seized is sufficient.

Such was the case here. The petitioner, his truck, and his residence were sufficiently linked to the alleged crime. However, as to the evidence which might be connected with the disappearance of Lana Harding, at the time the warrant

was issued, only the clothing described therein was truly known, this from a description of the petitioner and the alleged victim, Lana Harding. Consequently, the places to be searched and the items to be seized were as precisely described as the circumstances would allow.

Furthermore, the phrase "any other contraband" is similar to the phrase "any other evidence", which has been held to be legally acceptable, and not an authorization for a general search. Quigg v. Estelle, 492 F.2d 343 (9th Cir. 1974), cert. denied 419 U.S. 848 (1974). As Quigg points out such a phrase is merely a codification of the authority officers have to seize certain items under the "plain view" doctrine. The situation is best described in Quigg, supra, 1345;

> "It would be incongruous to make illegal what may otherwise be done legally simply because it was contained within the warrant."

For these reasons the search warrant in question was not invalid on its face and did not authorize a general search as contended by Petitioner.

The next phase of petitioner's second issue is whether certain items not described in the search warrant were illegally seized.

Petitioner cites a 1927 holding for the principle that an executing officer can only seize those items listed in the warrant and no others. Marron v. United States, 275 U.S. 192, 72 L.Ed 231, 48 S.Ct. 74 (1927). However, the modern trend of the law has altered this strict compliance approach by addressing the reality of the situation. The fact that certain items seized were not specifically described does not necessarily mean they were seized illegally.

Under the "plain view" doctrine police may seize evidence in plain view without a warrant when certain circumstances exist. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed 2d 564, 91 S.Ct. 2022 (1971). The court set forth a situation identical to the present case in enunciating acceptable examples of the doctrine at work, stating:

> "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." Coolidge v. New Hampshire, supra, 465.

In the case at hand the police were conducting a search pursuant to a valid warrant when in the course of such search they came across other evidence of an incriminating nature.

This case also meets the three requirements of the "plain view" doctrine as set forth in Coolidge: 1) the initial intrusion of the police was justified by a valid search warrant; 2) the discovery of the unlisted items was inadvertent (the police did not have prior knowledge of and prior intent to seize those items not described in the warrant, nor does the petitioner argue that such was the case); and 3) the evidence seized was of an incriminating nature.

Petitioner argues that two of the unlisted items seized, a pair of Red Wing boots and a plaid jacket, were not apparently incriminating, since blood traces were not found without a subsequent scientific analysis. However, this conclusion would be to ignore the testimony given by the executing officer at the suppression hearing, wherein he stated that the Red Wing boots were seized because their tread design was similar to two tracks observed outside the teacherage, and that the clothing seized was basically that which an individual observed petitioner wearing on the night of the homicide. This testimony satisfies the definition of incrimination objects, which is when the seizing authorities have reasonable or probable cause to believe that the object is evidence of a crime. U.S. v. Ross, 527 F.2d 984 (4th Cir. 1976), cert. denied 424 U.S. 945 (1976); U.S. v. Sedillo, 496 F.2d 151 (9th Cir. 1974), cert. denied 419 U.S. 947 (1974). In passing we note that Petitioner does not argue that any of the other evidence seized in the search, except the boots and jacket, were not incriminating, which included

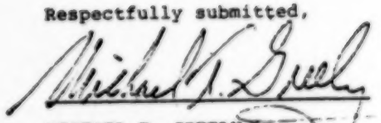
an exhaust manifold with human blood of the same type and Rh factor of Lana Harding, as well as brain and cortical tissue on it, and human blood on the bed and springs of the truck.

Therefore, probable cause did exist to search Petitioner's residence and truck, the search warrant was valid on its face, and the evidence not described in the search warrant was legally seized under the "plain view" doctrine.

CONCLUSION

Respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,



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